

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THERESA L. MAY,)
Plaintiff,)
v.) No. CV-04-1364-HU
JO ANNE B. BARNHART,)
Commissioner of Social) FINDINGS & RECOMME
Security,)
Defendant.)

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1 HUBEL, Magistrate Judge:

2 Plaintiff Theresa L. May brings this action for judicial
3 review of the Commissioner's final decision to deny disability
4 insurance benefits (DIB) and supplemental security income (SSI).
5 This Court has jurisdiction under 42 U.S.C. §§ 405(g)
6 (incorporated by 42 U.S.C. § 1383(c)(3)).

7 Defendant moves to remand the case for further proceedings
8 because of errors committed by the Administrative Law Judge (ALJ).
9 Plaintiff contends that the case should be remanded for a
10 determination of benefits. Because I agree with plaintiff, I
11 recommend that defendant's motion be granted to the extent
12 defendant seeks a remand, but denied to the extent it seeks
13 additional proceedings upon remand.

14 PROCEDURAL BACKGROUND

15 Plaintiff applied for DIB and SSI on April 12, 2002, alleging
16 an onset date of September 1, 2001. Tr. 25, 62-64, 417-19. Her
17 applications were denied initially and on reconsideration. Tr. 38-
18 42, 45-47, 421-25, 427-29.

19 On November 17, 2003, plaintiff, represented by counsel,
20 appeared for a hearing before an ALJ. Tr. 432-60. On January 12,
21 2004, the ALJ found plaintiff not disabled. Tr. 23-34. The
22 Appeals Council denied plaintiff's request for review of the ALJ's
23 decision. Tr. 6-10.

24 FACTUAL BACKGROUND

25 Plaintiff alleges disability based on depression and post-
26 traumatic stress disorder. Tr. 26, 102. At the time of the
27 November 17, 2003 hearing, plaintiff was forty-seven years old.
28 Tr. 62, 417. She is a high school graduate. Tr. 26, 108, 437.

1 Her past relevant work is as a customer service nursery worker, a
2 customer service deli worker, an office helper, a photo finisher,
3 and a tractor driver. Tr. 26, 142, 455-56.

4 I. Medical Evidence

5 Defendant concedes that the ALJ improperly rejected some of
6 the opinions expressed by George Suckow, M.D., plaintiff's treating
7 psychiatrist. I need not discuss medical evidence other than that
8 from Dr. Suckow as it is not relevant to the motion to remand and
9 it is not relevant to the determination of whether to remand for
10 additional proceedings or for an award of benefits.

11 Dr. Suckow treated plaintiff at the West Salem Mental Health
12 Clinic, at least since sometime in the fall of 1999. Tr. 241-317.
13 The record is unclear as to when her treatment with him actually
14 began. The first chart note from Dr. Suckow in the record is dated
15 September 22, 1999, but the tenor of the note suggests she had seen
16 him previously. Tr. 315. He continued to treat her at least
17 through mid-August 2003. Tr. 397.

18 Plaintiff had periodic appointments with Dr. Suckow, along
19 with regular therapy appointments with therapist Karen Keller,
20 M.A., also at the West Salem Mental Health Clinic. Tr. 241-317.
21 The treatment records continue from the fall of 1999 to October
22 2003. Id.; Tr. 397-412. During this time, Dr. Suckow's diagnoses
23 of plaintiff were borderline personality disorder, dissociative
24 identity disorder (DID) (formerly multiple personality disorder),
25 post-traumatic stress disorder (PTSD), and depression. E.g., Tr.
26 315 (borderline personality disorder, DID), 311 (borderline
27 personality disorder, DID), 305 (DID), 300 (DID, PTSD), 280 (DID),
28 268 (DID), 262 (DID), 245 (borderline personality disorder, DID),

1 241 (DID), 397 (depression, DID), 402 (DID, depression), 408 (DID).

2 Dr. Suckow's treatment notes indicate that plaintiff has been
3 suicidal, has complained of depression, has experienced panic
4 attacks, has had trouble sleeping, and has experienced nightmares
5 and flashbacks. E.g., Tr. 243, 273, 290, 300, 311. He has
6 treated her with a variety of medications, some with fairly
7 positive results and others not as successful. E.g., Tr. 307
8 (noting that plaintiff "seems to be doing a little better" and
9 continuing Effexor, Restoril, and Ambien); 300 (in response to
10 complaints about panic and anxiety attacks, Dr. Suckow prescribed
11 Klonipin and continued her on Effexor and Ambien, but reduced the
12 Restoril); 297 (noting that plaintiff "seems to be doing a lot
13 better," discontinuing Klonipin because of headaches, but keeping
14 other medications); 286 (plaintiff reports she is "pretty stable"
15 and does not want to change medications other than discontinuing
16 Ambien); 265 ("seems to be pretty stable" and "getting along fairly
17 well," continuing on a lower dose of Effexor and Ambien); 256
18 (started Celexa following period of being acutely suicidal); 249
19 (switched from Celexa to Lexapro); 243 (new prescription for
20 Dalmane for sleep; continued on Lexapro).

21 In November 2003, Dr. Suckow completed a "Medical Source
22 Statement" in which he opined that plaintiff was limited to part-
23 time work as was currently being performed because of limited
24 stamina. Tr. 413. He ranked her as being "fair"¹ in (1) the

25
26 ¹ The Medical Source Statement defines "fair" as
27 "[s]ubstantial loss of ability to perform the named activity in
28 a regular, competitive employment and, at best, could do so only in
a sheltered work setting where special considerations and
attention are provided." Tr. 413.

1 ability to remember work-like procedures, (2) the ability to
2 maintain attention for extended periods of two-hour segments, (3)
3 the ability to maintain regular attendance and be punctual within
4 customary tolerances, (4) the ability to sustain ordinary routine
5 without special supervision, (5) the ability to work in
6 coordination with or proximity to others without being unduly
7 distracted by them, (6) the ability to get along with co-workers or
8 peers without unduly distracting them or exhibiting behavioral
9 extremes, (7) the ability to accept instructions and respond
10 appropriately to criticism from supervisors, (8) the ability to
11 make simple work-related decisions, and (9) the ability to respond
12 appropriately to changes in a routine work setting. Tr. 413-14.

13 He considered plaintiff to be "good"² in (1) the ability to
14 understand and remember very short and simple instructions, (2) the
15 ability to carry out very short and simple instructions, (3) the
16 ability to ask simple questions or request assistance, and (4) the
17 ability to be aware of normal hazards and take appropriate
18 precautions. Id.

19 Dr. Suckow considered plaintiff to have "poor/no[]"³ ability
20 to complete a normal workday and workweek without interruptions
21 from psychologically based symptoms and perform at a consistent
22 pace without an unreasonable number and length of rest periods.

23
24 ² The Medical Source Statement defines "good" as "[s]ome
25 loss of ability to perform the named activity but still capable
of performing it in regular, competitive employment." Tr. 413.

26 ³ The Medical Source Statement defines "poor/none" as
27 "[c]omplete loss of ability to perform the named activity in
regular, competitive employment and in a sheltered work setting;
28 could do so only to meet basic needs at home." Tr. 413.

1 Tr. 414.

2 Dr. Suckow opined that plaintiff had "physical and/or mental
3 impairments resulting from anatomical, physiological or
4 psychological abnormalities shown by acceptable clinical and/or
5 laboratory diagnostic techniques" and that those impairments could
6 reasonably be expected to produce the functional limitations he
7 previously set forth. Tr. 415. He indicated that plaintiff's
8 impairments or conditions were depression and DID. Id. He
9 considered them to be permanent and to have existed and persisted
10 with restrictions at least as severe as indicated since at least
11 September 1, 2001. Id. He opined that the exact onset date was
12 unknown, but that the conditions had persisted for years. Id.

13 II. Lay Witness Testimony

14 Defendant concedes that the ALJ improperly failed to consider
15 the lay observations of Keller⁴ and of plaintiff's friend Karen
16 McGilchrist. Defendant further concedes that the ALJ failed to
17 provide a basis for rejecting the testimony of plaintiff's employer
18 Helen Abel. Accordingly, the testimony of all of these witnesses
19 is relevant.

20 Keller's treatment notes are intertwined with Dr. Suckow's.
21 Tr. 241-317. As indicated above, Keller provided regular therapy
22 to plaintiff while Dr. Suckow saw her intermittently. Over the
23

24 ⁴ Although Keller is apparently a trained therapist, she is
25 not an acceptable medical source under 20 C.F.R. §§ 404.1513(a),
26 416.913(a). Rather, such professionals are "other sources" as
27 described in the regulations. 20 C.F.R. §§ 404.1513(d),
28 416.913(d). Under Ninth Circuit precedent, testimony from "other
source" professionals is evaluated under the standard for other
lay witnesses. See Dodrill v. Shalala, 12 F.3d 915, 919 (9th
Cir. 1993).

1 course of her treatment, Keller noted plaintiff's recurrence of DID
2 symptoms, practice of "self-harm" behaviors, states of crisis
3 including suicidal ideation and hopelessness, depression, anxiety,
4 and fatigue. E.g., Tr. 316, 314, 313, 312, 308, 301, 296, 292,
5 291, 276, 264, 263, 261, 259, 249.

6 On January 20, 2003, McGilchrist indicated that she saw
7 plaintiff daily and that plaintiff left the house daily to work for
8 three hours. Tr. 163-64. Other than that, she never went to the
9 grocery store, never visited relatives, rarely did other types of
10 shopping or visited friends, and did not participate in social
11 activities. Tr. 164.

12 She further noted that plaintiff had lost interest in
13 everything. Tr. 165. She indicated that plaintiff did not
14 participate in several activities she used to do because of
15 depression. Tr. 168. McGilchrist remarked that plaintiff had
16 trouble sleeping, had recently lost weight, had a poor appetite,
17 and no longer did much around the house. Tr. 169. She prepared
18 one meal for herself per day if she felt up to it. Id. While
19 plaintiff did laundry once per day, she had lost interest in, or
20 did not care about, other household activities such as dusting,
21 vacuuming, emptying trash, yard work, gardening, and home repair.
22 Tr. 170. She no longer had a desire to do anything around the
23 house. Tr. 171.

24 McGilchrist indicated that plaintiff could not usually
25 remember and discuss what she had read. Id. McGilchrist noted
26 that plaintiff took Lexapro and Ambien daily and that the
27 medication helped sometimes in regard to plaintiff's nightmares.
28 Tr. 172. She described plaintiff's typical day as waking up early,

1 showering and dressing for work, working from 11:00 a.m. to 2:00
2 p.m., then returning home and laying in bed. Tr. 173. She opined
3 that plaintiff was "very depressed" and that this would interfere
4 with her ability to work on a regular basis. Id. McGilchrist
5 noted that plaintiff's depression had been debilitating in recent
6 years and that she had attempted suicide several times. Tr. 174.

7 Abel testified at the hearing on plaintiff's behalf. Tr. 447.
8 At that time, she had known plaintiff for approximately three and
9 one-half years. Id. Abel met plaintiff when they worked together
10 at "Dottie's in Wilsonville" but since that time, Abel had become
11 plaintiff's employer when she hired plaintiff to work at a deli
12 Abel owns in Woodburn. Tr. 448. At Dottie's, Abel noticed that
13 plaintiff could not do "bookwork" and had trouble with the
14 register, although she was good with the customers. Id. Abel
15 filled in for plaintiff several times when plaintiff did not come
16 to work because she was feeling bad. Id.

17 Despite these problems, Abel hired plaintiff to work at the
18 deli because she liked her. Id. At the deli, plaintiff takes
19 orders, helps make sandwiches, and sometimes runs the register.
20 Id. Abel described plaintiff as sometimes being "out of it" at
21 work and noted that she can be emotional and upset. Tr. 449. Abel
22 has to have someone else do plaintiff's jobs on those occasions.
23 Id. Additionally, Abel has a backup employee for plaintiff because
24 plaintiff misses a lot of work. Id. Abel never knows if plaintiff
25 is going to be there. Id. She indicated that she was working with
26 plaintiff to keep her employed because she knows plaintiff needs
27 the job, but she noted that plaintiff is upset, emotional, and
28 depressed. Id.

1 Plaintiff's work schedule is three hours per shift, three
2 shifts per week. Tr. 449. At least once per week she is extremely
3 late and when she comes in, Abel can tell that plaintiff has had a
4 bad morning or a bad day. Tr. 450. Abel will call the backup in
5 such situations. Id.

6 Plaintiff makes a lot of mistakes with the cash register, but
7 is wonderful with the customers. Id. Abel described plaintiff as
8 shaking so much that she worries when plaintiff carries a plate of
9 food or hands money back to a customer. Id. Some days, however,
10 plaintiff can be very calm. Id. Abel has observed plaintiff lose
11 concentration at work. Tr. 450-51.

12 III. Plaintiff's Testimony

13 Defendant concedes that the ALJ failed to fully consider all
14 of plaintiff's testimony in finding her subjective complaints not
15 entirely credible. Thus, plaintiff's testimony at the hearing is
16 relevant.

17 Plaintiff testified that she worked at Abel's deli, three
18 hours per day. Tr. 438. She left her previous job working for a
19 rose grower because she was missing a lot of work due to her
20 depression. Tr. 439. She also described having problems with the
21 book work at Dottie's in addition to having attendance problems
22 there. Tr. 441.

23 Plaintiff stated that she did not work additional hours at the
24 deli owned by Abel because she has a hard time concentrating and
25 three hours is about what she can do before she has a hard time
26 doing what Abel asks her to do. Tr. 442. She often makes errors
27 in taking orders and making change, but Abel can figure out the
28 paperwork after plaintiff is off the till. Id. After her shift,

1 plaintiff comes home and takes it easy because she needs to calm
2 down. Tr. 444.

3 Plaintiff was visibly trembling or jiggling during the
4 hearing, which she attributed to being anxious. Tr. 443. She
5 indicated that it occurs often. Id.

6 She sometimes reads for pleasure, but she had not read a book
7 all the way through for a few years and has problems remembering
8 what she reads. Tr. 444.

9 Her medications at the time were Lexapro and Triazolam. Tr.
10 445. They help her with depression and nightmares. Id. She had
11 also been prescribed Ambien and Sonata, but had run out of both of
12 those. Id.

THE ALJ'S DECISION

14 The ALJ found that plaintiff had not engaged in any
15 substantial gainful activity since her alleged onset date. Tr. 26,
16 33. The ALJ then found that plaintiff had severe impairments of
17 depression, an anxiety-related disorder, and a history of alcohol
18 abuse. Tr. 28, 33. While finding the impairments to be severe, he
19 concluded they did not meet or equal any listed impairments. Id.

20 _____ The ALJ determined that plaintiff's mental impairments
21 resulted in mild restrictions of activities of daily living. Tr.
22 28. He found that she had moderate difficulties in maintaining
23 social functioning and in maintaining concentration, persistence,
24 and pace. Id. He determined that she was limited to "simple, 1-2-
25 3 step work with limited interaction with the public and
26 coworkers[]" and that she could perform light to medium work. Tr.
27 31.

28 Based on this assessment of plaintiff's residual functional

1 capacity (RFC), the ALJ, relying on the testimony of a vocational
2 expert (VE), concluded that plaintiff could return to her former
3 jobs as an office helper, photo refinisher, and tractor driver.
4 Tr. 31. However, because the ALJ was unclear whether these jobs
5 were actually performed at the substantial gainful activity level
6 in order to be considered past relevant work, he proceeded to the
7 fifth step of the sequential evaluation and determined, again based
8 on the testimony of the VE, that she could perform the jobs of food
9 preparation worker and stock checker, jobs existing in significant
10 numbers in the national economy. Tr. 31-32. Accordingly, the ALJ
11 concluded that plaintiff is not disabled. Tr. 32, 33.

STANDARD OF REVIEW & SEQUENTIAL EVALUATION

13 A claimant is disabled if unable to "engage in any substantial
14 gainful activity by reason of any medically determinable physical
15 or mental impairment which . . . has lasted or can be expected to
16 last for a continuous period of not less than 12 months[.]" 42
17 U.S.C. § 423(d)(1)(A).

18 Disability claims are evaluated according to a five-step
19 procedure. Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th Cir.
20 1991). The claimant bears the burden of proving disability.
21 Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989). First, the
22 Commissioner determines whether a claimant is engaged in
23 "substantial gainful activity." If so, the claimant is not
24 disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§
25 404.1520(b), 416.920(b). In step two, the Commissioner determines
26 whether the claimant has a "medically severe impairment or
27 combination of impairments." Yuckert, 482 U.S. at 140-41; see 20
28 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not

disabled.

In step three, the Commissioner determines whether the impairment meets or equals "one of a number of listed impairments that the [Commissioner] acknowledges are so severe as to preclude substantial gainful activity." Yuckert, 482 U.S. at 141; see 20 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively presumed disabled; if not, the Commissioner proceeds to step four. Yuckert, 482 U.S. at 141.

In step four the Commissioner determines whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can, he is not disabled. If he cannot perform past relevant work, the burden shifts to the Commissioner. In step five, the Commissioner must establish that the claimant can perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the Commissioner meets its burden and proves that the claimant is able to perform other work which exists in the national economy, he is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

The court may set aside the Commissioner's denial of benefits only when the Commissioner's findings are based on legal error or are not supported by substantial evidence in the record as a whole. Baxter, 923 F.2d at 1394. Substantial evidence means "more than a mere scintilla," but "less than a preponderance." Id. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

STANDARDS FOR REMAND

The court has discretion to reverse the Commissioner's final decision with or without a remand for further administrative

1 proceedings. Harman v. Apfel, 211 F.3d 1172, 1177 (9th Cir. 2000).
2 When an ALJ improperly rejects evidence, as defendant concedes
3 occurred here, the court should credit such evidence and remand for
4 an award of benefits when: "'(1) the ALJ failed to provide legally
5 sufficient reasons for rejecting such evidence, (2) there are no
6 outstanding issues that must be resolved before a determination of
7 disability can be made, and (3) it is clear from the record that
8 the ALJ would be required to find the claimant disabled were such
9 evidence credited.'" Moore v. Commissioner, 278 F.3d 920, 926 (9th
10 Cir. 2002) (quoting Smolen v. Commissioner, 80 F.3d 1273, 1292 (9th
11 Cir. 1996)).

12 This court is aware of Ninth Circuit cases recognizing that
13 the "crediting as true" rule is not mandatory. Connett v.
14 Barnhart, 340 F.3d 871, 876 (9th Cir. 2003). Thus, when a court
15 finds that the ALJ improperly rejected the subjective symptom
16 testimony of a claimant, it has some flexibility and is not
17 required to credit the testimony as a matter of law and direct an
18 award of benefits. Id. It is unclear whether this flexibility is
19 available where, as here, the ALJ has improperly rejected the
20 opinion of a treating physician. See Benecke v. Barnhart, 379 F.3d
21 587, 594-95 (9th Cir. 2004) (in a post-Connett case, Ninth Circuit
22 credited the opinions of treating physicians and claimant's
23 testimony when ALJ failed to provide legally sufficient reasons for
24 rejecting this evidence, and reversed a district court order of
25 remand for further administrative proceedings and instructed that
26 the district court remand for payment of benefits).

27 However, I decline to resolve that legal issue. Even if the
28 rule is not mandatory, for the reasons explained below, I exercise

1 my discretion to credit Dr. Suckow's opinion as a matter of law.
2 I further exercise my discretion to credit the testimony of the
3 other witnesses as well.

4 DISCUSSION

5 I. The ALJ's Errors in Improperly Rejecting Testimony

6 A. Dr. Suckow

7 The ALJ gave significant weight to Dr. Suckow's opinion that
8 plaintiff was limited in her abilities to perform detailed tasks
9 and interact with coworkers. Tr. 30. However, the ALJ rejected
10 the rest of Dr. Suckow's opinions, stating that "there is no
11 evidence that the claimant would have difficulty remembering work-
12 like procedures. She exhibits no memory deficits and has been
13 capable of remembering procedures at her current job." Id.

14 Defendant concedes that this basis for rejecting Dr. Suckow's
15 opinion is not supported in the record because it ignores
16 plaintiff's testimony in which she described making several errors
17 and having a hard time concentrating on what she was supposed to do
18 in her job. Tr. 442. The ALJ also failed to acknowledge that Abel
19 described plaintiff as making a lot of mistakes with the cash
20 register and observed her to lose concentration while making a
21 sandwich. Tr. 450-51.

22 The ALJ also rejected Dr. Suckow's opinion because "there is
23 no evidence that she has poor or no ability to complete a normal
24 workday and workweek without interruptions from psychologically
25 based symptoms and perform at a consistent pace without an
26 unreasonable number and length of rest periods." Tr. 30.
27 Defendant concedes that this basis of rejection is also not
28 supported in the record because it ignores plaintiff's testimony

1 that she did not work more than three hours per day, less than one-
2 half of a full shift, because she had a hard time concentrating on
3 what she was supposed to do, and because it ignores Abel's
4 testimony that she has had to ask someone else to do plaintiff's
5 job when plaintiff was "out of it," emotional, upset, and shaking,
6 and has to have a backup for plaintiff because plaintiff misses a
7 lot of work. Tr. 449. Defendant concedes that the ALJ also failed
8 to consider Abel's testimony that although plaintiff only worked
9 three hour shifts, three days per week, she still was extremely
10 late at least once per week, necessitating a call to the backup
11 employee. Tr. 449-50.

12 Another basis the ALJ gave for rejecting Dr. Suckow's opinion
13 was that "while she is unreliable in her work attendance, treatment
14 records reflect her difficulties are related more to her many
15 personal issues than to her medically determinable impairments."
16 Tr. 29. The ALJ noted that plaintiff "has related to her counselor
17 a multitude of stressors including a recent divorce, internet
18 searches and traveling in pursuit of lesbian relationships, the
19 death of her mother, and problems dealing with family members."
20 Tr. 30.

21 Defendant concedes, however, that the treatment records
22 regarding the stressors cited by the ALJ do not state whether
23 plaintiff's unreliable work attendance was related to her personal
24 issues rather than to her medically determinable impairments.
25 Defendant also concedes that the ALJ did not address Dr. Suckow's
26 opinion that plaintiff's depression and DID were impairments
27 resulting from anatomical, physiological, or psychological
28 abnormalities shown by acceptable clinical and/or laboratory

1 diagnostic techniques and that these impairments could reasonably
2 be expected to produce the functional limitations assessed by Dr.
3 Suckow, including plaintiff's "fair" ability to maintain regular
4 attendance and be punctual within customary tolerances. Tr. 414,
5 415.

6 B. Lay Testimony

7 1. Keller, McGilchrist, & Abel

8 Defendant concedes that the ALJ failed to consider Keller's
9 lay observations of plaintiff's fatigue, anxiety, and depression,
10 which are set out above. As to McGilchrist's written testimony and
11 Abel's oral testimony, defendant concedes that the ALJ erred in
12 failing to fully evaluate their testimony. Defendant notes that
13 the ALJ failed to discuss McGilchrist's statement at all and only
14 mentioned Abel's testimony. The ALJ did not provide any reasons to
15 reject either of the witnesses's statements.

16 2. Plaintiff's Testimony

17 The ALJ rejected plaintiff's subjective complaints as not
18 entirely credible because she had traveled frequently, noting her
19 reports of traveling with her partner and living out of motels,
20 having a good time in Las Vegas on a trip, and taking a ten-day
21 trip to the east coast to meet a woman she met over the internet.
22 Tr. 29. However, defendant concedes that the ALJ failed to
23 consider that the November 15, 2001 treatment note mentioning
24 plaintiff's recent travel with her partner and living out of
25 motels, also mentioned that plaintiff looked exhausted, ill, and
26 very depressed, was not eating again, and thought about dying, but
27 did not have a plan. Tr. 261. Defendant further notes that the
28 ALJ failed to consider that the May 23, 2003 treatment note

1 mentioning plaintiff's east coast trip also stated that "her
2 dependency needs are very strong and seem to override other
3 reasoning," that plaintiff was obsessing over the woman and making
4 herself sick, and that plaintiff was extremely anxious. Tr. 401.
5 Thus, defendant concedes, the record does not support the ALJ's
6 articulated basis for rejecting plaintiff's testimony.

7 The ALJ also rejected plaintiff's subjective complaints
8 because she works "part-time" and her "employer indicates she does
9 well with customers and 'they love her.'" Tr. 29. Defendant
10 notes, however, that the ALJ failed to address the testimony from
11 plaintiff and Abel regarding plaintiff's many difficulties when
12 working, even part-time.

13 Defendant concedes that the ALJ's statement that the treatment
14 records reflect that plaintiff's work attendance problems are
15 related more to her many personal issues than to her medically
16 determinable impairments, is not supported by the record.
17 Defendant notes that the ALJ did not explain what treatment records
18 support his conclusion about the cause of plaintiff's unreliable
19 attendance and that the treatment notes reflecting the multitude of
20 stressors in plaintiff's life and listed by the ALJ did not address
21 the attendance issue. Finally, defendant also concedes that the
22 ALJ failed to specify what evidence in the record supported his
23 conclusion that plaintiff's subjective complaints were contradicted
24 by her ability to "perform all activities of daily living." Tr.
25 29. Defendant notes that the evidence in fact shows that plaintiff
26 did not perform all activities of daily living and she either did
27 not care or had lost interest in doing most activities. E.g., Tr.
28 152, 157, 158, 159-60, 162, 164, 165, 169, 170, 171, 183, 212, 443-

1 44.

2 II. Remand Analysis

3 A. Failure to Provide Legally Sufficient Reasons
4 for Rejecting Evidence

No further discussion of this factor is required given that defendant concedes that the ALJ failed to provide legally sufficient reasons for rejecting Dr. Suckow's opinions, as well as the testimony of Keller, McGilchrist, Able, and plaintiff. My independent review of the record confirms that defendant is correct. See Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998) (when treating physician's opinion is not contradicted by another doctor, it may be rejected only for clear and convincing reasons supported by substantial evidence in the record); Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996) (while lay witnesses are not competent to testify to medical diagnoses, they may testify as to a claimant's symptoms or how an impairment affects the ability to work); Smolen, 80 F.3d at 1281-82 (once a claimant shows an underlying impairment and a causal relationship between the impairment and some level of symptoms, clear and convincing reasons are needed to reject a claimant's testimony if there is no evidence of malingering; in assessing plaintiff's credibility ALJ must consider claimant's work record, observations of treating and examining physicians and other third parties, functional restrictions caused by symptoms, and plaintiff's daily activities); Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993) (ALJ had to give specific reasons, germane to the witness, for disregarding lay witness testimony regarding claimant's condition as lay eyewitness can tell whether someone is suffering or merely malingering).

1 B. Outstanding Issues

2 Defendant argues that remand for additional proceedings is
3 necessary because there are outstanding issues in regard to the re-
4 evaluation of the testimony of Dr. Suckow, Keller, McGilchrist,
5 Abel, and plaintiff, and further, because there are outstanding
6 issues in regard to plaintiff's RFC and the VE testimony.

7 Defendant first contends that remand is necessary to allow the
8 ALJ to further evaluate Dr. Suckow's reports and opinions, to
9 further evaluate Keller's reports and opinions, to further consider
10 the lay witness evidence of McGilchrist and Abel, and to further
11 evaluate plaintiff's credibility. Ninth Circuit cases indicate
12 that remanding only to evaluate improperly rejected testimony is
13 not the type of "outstanding issue" involved in the three-part
14 Moore/Smolen remand analysis.

15 Appellate cases suggest that appropriate "outstanding issues"
16 include (1) where the VE has not addressed the limitations as
17 established by improperly discredited evidence, Harman, 211 F.3d at
18 1180⁵; (2) where the ALJ has not had an the opportunity to evaluate
19 relevant evidence submitted only to the Appeals Council, Harman,
20 211 F.3d at 1180; (3) when the agency must consider in the first
21 instance an issue it did not previously address, INS v. Ventura,

22
23
24

25 ⁵ A more recent Ninth Circuit case suggests that a remand
26 for a determination of benefits may be appropriate even in the
27 presence of only limited VE testimony when the record as a whole
28 establishes that the claimant is unable to perform gainful
employment in the national economy, even though the VE does not
address the precise work limitations established by the
improperly discredited testimony. Benecke, 379 F.3d at 595.

1 537 U.S. 12, 13 (2002) (per curiam)⁶; and (4) other relevant
2 procedural issues, Moisa v. Barnhart, 367 F.3d 882, 887 (9th Cir.
3 2004) (noting such procedural requirements as insured status,
4 application on record, attainment of retirement age).

5 Remanding simply to allow the ALJ to perform the analysis he
6 or she should have done properly in the first instance is not the
7 type of "outstanding issue" recognized in Harman and other cases
8 addressing this issue. E.g. Benecke, 379 F.3d at 595 ("Allowing
9 the Commissioner to decide the [credibility and treating physician
10 opinion evidence] issue again would create an unfair 'heads we win;
11 tails let us play again' system of disability benefit
12 adjudication."); Moisa, 367 F.3d at 887 (noting that the
13 "Commissioner, having lost this appeal, should not have another
14 opportunity to show that Moisa is not credible any more than Moisa,
15 had he lost, should have an opportunity for remand and further
16 proceedings"); see also Varney v. Secretary, 859 F.2d 1396, 1398-99
17 (9th Cir. 1988) ("Delaying the payment of benefits by requiring
18 multiple administrative proceedings that are duplicative and
19 unnecessary only serves to cause the applicant further damage -
20 financial, medical, and emotional.").

21 Defendant's attempt to identify outstanding issues in regard
22 to the improperly rejected or neglected testimony or opinions of
23 Dr. Suckow, Keller, McGilchrist, Abel, or plaintiff, is nothing
24

25 ⁶ An example would be where the VE testimony procured by
26 the ALJ was limited to the step four analysis of the ability to
27 perform past relevant work and with the crediting of improperly
28 rejected evidence, it becomes necessary upon remand to proceed to
the step five analysis of performing other work in the national
economy.

1 more than providing the ALJ with a second and unwarranted
2 opportunity to re-evaluate their testimony. As Benecke and Moisa
3 make clear, such an opportunity is not a valid basis for remand.

4 Second, defendant attempts to manufacture "outstanding issues"
5 related to plaintiff's RFC and the VE testimony regarding
6 plaintiff's ability to perform her previous work or other work in
7 the national economy. Defendant argues that because remand is
8 necessary for the ALJ to further evaluate Dr. Suckow's opinions,
9 Keller's reports, McGilchrist's testimony, Abel's testimony, and
10 plaintiff's credibility, remand is also necessary for the ALJ to
11 re-evaluate plaintiff's RFC. Continuing in this vein, defendant
12 contends that after the testimony, opinions, and reports of these
13 witnesses are properly evaluated, it may be necessary for the ALJ
14 to obtain additional VE testimony to re-evaluate, based upon a new
15 RFC, plaintiff's ability to perform her previous work or other work
16 in the national economy.

17 The problem with defendant's argument in this regard is that
18 it is based on defendant's assumption that remand is necessary for
19 the ALJ to first further evaluate the improperly rejected or
20 neglected opinions, reports, or testimony. For the reasons
21 explained immediately above, defendant's assumption is flawed and
22 not supported by the relevant Ninth Circuit case law. When the
23 improperly rejected testimony and opinions are considered, there
24 are no outstanding issues regarding plaintiff's RFC because Dr.
25 Suckow's opinions, described above, constitute an effective
26 assessment of her RFC. And, as discussed below, the VE offered an
27 opinion based on the improperly rejected testimony and opinions
28 regarding plaintiff's ability to maintain competitive employment.

1 Thus, the record in regard to plaintiff's RFC and any relevant VE
2 testimony is fully developed. There are no outstanding issues
3 warranting a remand to the ALJ for further proceedings.

4 C. Determination of Disability

5 As noted above, Dr. Suckow opined that plaintiff's ability to
6 remember work-like procedures, to maintain attention for two-hour
7 segments, to maintain regular attendance and be punctual within
8 customary tolerances, to work in coordination with or proximity to
9 others without being unduly distracted by them, and to make simple
10 work-like decisions, was "fair," meaning that she had a substantial
11 loss of the ability to perform the activity in regular, competitive
12 employment and at best, could do so only in a sheltered work
13 setting with special considerations and attention. He also opined
14 that she had a complete loss of ability to complete a normal
15 workday and workweek without interruptions from psychologically
16 based symptoms and perform at a consistent pace without an
17 unreasonable number and length of rest periods. He considered
18 plaintiff's impairments to be permanent and to have existed and
19 persisted since at least September 1, 2001.

20 Testimony from Abel and plaintiff corroborated Dr. Suckow's
21 opinions by relating the limited number of days and hours that
22 plaintiff is able to work, as well as her frequent tardiness and
23 absenteeism, even with her limited hours. Keller's and
24 McGilchrist's testimony further supports Dr. Suckow's opinions by
25 establishing that plaintiff's activities of daily living are also
26 quite limited and that she is in frequent crisis, to the point of
27 attempting suicide more than once.

28 The VE testified that a person missing two or more days of

1 work per month cannot maintain competitive employment. Tr. 458.
2 Moreover, under the Social Security Act, a claimant is disabled if
3 the claimant cannot work on a "regular and continuing" basis, which
4 means eight hours a day, five days a week. See Soc. Sec. Ruling
5 96-8p (1996 WL 374184); see also Irwin v. Shalala, 840 F. Supp.
6 751, 763 (D. Or. 1993) (critical inquiry in social security case is
7 claimant's capacity for work activity on a regular and continuing
8 basis); Ratto v. Secretary, 839 F. Supp. 1415, 1430 (D. Or. 1993)
9 (plaintiff is disabled as a matter of law if she is unable to work
10 an eight-hour day with normal breaks).

11 The law establishes that if Dr. Suckow's opinions are
12 credited, along with plaintiff's subjective testimony, and are
13 considered with Keller's notes and McGilchrist's and Abel's
14 testimony, plaintiff's limitations are so severe as to preclude her
15 from maintaining substantial gainful employment. Thus, when the
16 improperly rejected or neglected testimony and opinions are
17 credited, it is clear that plaintiff is disabled under the Social
18 Security Act.

19 Accordingly, under the three-part remand test, the ALJ failed
20 to provide legally sufficient reasons for rejecting the evidence,
21 there are no outstanding issues that must be resolved before a
22 determination of disability can be made, and it is clear from the
23 record that the ALJ would be required to find plaintiff disabled
24 were such evidence credited. The appropriate course is to remand
25 for a determination of benefits.

26 CONCLUSION

27 I recommend that defendant's motion to remand (#22) be granted
28 to the extent that the case is remanded but denied to the extent

that defendant seeks a remand for additional administrative proceedings. I recommend that the case be remanded for a payment of benefits and that a judgment to that effect be entered.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due December 6, 2005. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, a response to the objections is due December 20, 1005, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 22nd day of November, 2005.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge